89-717

Supreme Court, U.S.
FILED
SEP 15 1989
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GEORGE LEE MAYER and JOHN WILLIAM KETANER

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where police have probable cause to search packages placed within a vehicle, but no probable cause as to the vehicle generally, was it unreasonable for the police to conduct a warrantless search of the packages within the vehicle?

2. Since information acquired during the warrantless search of the vehicles was included in the Affidavit for a Search Warrant of Petitioner Ketaner's house, was the Search Warrant defective as the "fruit of the poisonous tree"?

LIST OF PARTIES IN THE PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties except Defendant Urban Daniel Gomes was a party in the lower court and in the appeal to the United States Court of Appeals, Ninth Circuit.

SEARCH OF THE AUTOMOBILES CONSTITUTED A VIOLATION OF PETITIONER KETANER'S FOURTH AMENDMENT RIGHT AND THE INFORMATION DERIVED FROM THAT ILLEGAL SEARCH WAS USED TO OBTAIN A WRRANT FOR THE SEARCH OF KETANER'S HOUSE. THE RESULTS OF THE SEARCH OF THE KETANER HOUSE ARE THE FRUITS OF THE POISONOUS TREE 22

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OPINION BELOW

The Memorandum issued by the United States Court of Appeals for the Ninth Circuit appears as Appendix "A"

to this Petition. The Memorandum Opinion was issued not for publication and would therefore not appear in any official reports.

JURISDICTION

The Memorandum Opinion in the United States Court of Appeals for the Ninth Circuit was issued on May 22, 1989.

Petitioners herein filed with the United States Court of Appeals Appellant's Petition for Rehearing in Banc which was denied by the United States Court of Appeals for the Ninth Circuit on July 17, 1989.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec.

1254(1) and U.S.C.S. Court Rules Supreme Court, Rule 17.1(a) and (c).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C.S. Constitution Amendment 4 provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Federal Jurisdiction:

Petitioner's were convicted of a violation of Title 21, U.S.C. Section 841(a)(1). A timely Notice of Appeal was filed pursuant to Rule 4B(f) of

the Federal Rules of Appellate Procedure. Jurisdiction in the District Court was conferred by Title 18, U.S.C., Sec. 3231. Jurisdiction in the United States Court of Appeals for the Ninth Circuit was conferred by Title 28 U.S.C., Sec. 1291.

Facts material to the consideration of questions presented: In September, 1987, agent Allan Winn of the Drug Enforcement Administration in Phoenix, Arizona, was introduced to a confidential informant (Tr. 66)[1] The informant provided detailed

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[1] References to transcript refers to a hearing on Petitioner's Motion to Suppress.

information relating to a marijuana smuggling operation involving Petitioners. (Tr. 82) Plans were made for agents to conduct surveillance of a meeting between Petitioner Mayer and informant regarding this smuggling operation and a recording was made of that conversation. (Tr. 5 and 6) Plans were made by Petitioner to meet near Wickenburg, Arizona, in October of 1987. (Tr. 7)

On October 17, 1987, agents conducted surveillance of a meeting between the informant and Petitioners and others at the intersection of State Road 93 and the Alma Lake Road

in Arizona. (Tr. 9) Later that day, the informant provided agents with information about the plans to import marijuana which was to be executed the following day. The informant was to fly to Mexico on the morning of October 18, 1987, receive the marijuana, then return to the air strip where others with trucks would offload the marijuana from the airplane and put it into the waiting vehicles. (Tr. 21-22, 55-56, 85-88) The officer testified at the suppression hearing that prior to the time that the marijuana was unloaded from the airplane, he had no information that Petitioners were in

possession of any contraband. (Tr. 96)

On the morning of October 18, 1987, the plane, piloted by the informant, was observed leaving Arizona and followed by way of transponder to the Mexican border. (Tr. 33, 57) At about 2:30 p.m. on that same date, it was again observed by radar flying northbound from Mexico towards the United States boarder. (Tr. 33) The plane was then tracked to the landing strip near the Alma Lake Road. (Tr. 38) At that location, approximately 20 agents were present to conduct surveillance and to make arrests. (Tr. 35) The agents

also had surveillance aircraft overhead and customs blackhawk helicopter at their disposal. (Tr. 35)

The airplane landed at the air strip and met two vehicles. A blue pickup truck and a light colored mini-van. The pilot and the two individuals then were observed loading the contents of the airplane into the two vehicles. (Tr. 38-39, 89) Those persons conducting surveillance were able to see articles or items being loaded by the individuals into the vehicles from the aircraft. (Tr. 38-39)

Special Agent Winn indicated at

the suppression hearing that he knew that the marijuana was going to be unloaded from a plane into the vehicles and that he had no information that there was marijuana already in the vehicles when they arrived at the airstrip. (Tr. 95 and 96)

After driving a short distance, the two vehicles went in different directions and they were subsequently stopped by law enforcement officers where they were arrested and the vehicles were taken to a staging area where they were searched without a warrant. (Tr. 55) The packages from the airplane consisted of white cloth

bags which contained green heat-sealed plastic packages. (Tr. 42 and 49) The marijuana was located inside of those packages.

Petitioners were charged with a violation of 21 U.S.C., Sec. 841(a)(1) and after Petitioners' Motions to Suppress were denied, they entered conditional guilty pleas, reserving their right to appeal the trial court's ruling on their Motions to Suppress Evidence.

ARGUMENT

POINT I

WHERE POLICE HAVE PROBABLE CAUSE TO SEARCH A PACKAGE PLACED WITHIN A VEHICLE, BUT NO PROBABLE CAUSE AS TO THE VEHICLE GENERALLY, IT WAS UNREASONABLE FOR

THE POLICE TO CONDUCT A WARRANTLESS SEARCH OF THE PACKAGES WITHIN THE VEHICLE.

According to the provisions of Rule 17.1(c), Supreme Court Rules, this Court may exercise its discretion and review a lower federal court decision which has decided an important question of federal law, either unsettled by this Court or in a way in conflict with applicable decisions of this Court. It is respectfully submitted that the opinion by the Ninth Circuit Court of Appeals in this case involves an important question of federal law which should be settled by this Court and the Federal Court of Appeals

Decision is in conflict with applicable decisions of this Court.

It is also respectfully submitted that the opinions of this Court regarding the reach of the automobile exception to the warrant requirement are not consistent one with another, and ought to be settled in this case.

In Carroll v. United States, 267 U.S. 132 (1925), this Court authorized warrantless searches of automobiles if such searches are based on probable cause to believe that the vehicle in question contains contraband. The Carroll court, in fashioning the "automobile exception" rule to the

warrant requirement premised its holding on the "inherent mobility (of automobiles) which often makes obtaining a judicial warrant impracticable."

This Court, in United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979) held that a warrantless search of a foot locker and a suitcase inside a vehicle violated the Fourth Amendment. In Chadwick, a foot locker became the focus of police investigation and suspicion when a trained police dog alerted positively to a sniff of the foot locker and the foot locker was also observed to be

leaking talcum powder, a substance commonly used to mask the odor of marijuana. The foot locker was placed in a vehicle which was stopped by local agents. The foot locker was opened without a warrant and marijuana was discovered. This Court rejected the Government's argument that the foot locker had some of the mobile characteristics of automobiles, thus justifying the warrantless search, noting:

> . . . A person's expectation of privacy in personal luggage are substantially greater than in an automobile.

433 U.S. at 13.

In Arkansas v. Sanders, supra,

police officers received information that a person would arrive at the local airport on a specified flight. The informant provided the officers with additional information regarding this individual's smuggling activities. The person was located at an airport, surveillance was conducted and the green suitcase identified by the informant was placed in a taxi. The taxi was later stopped and a warrantless search of the suitcase resulted in the discovery of marijuana. This Court relied on Chadwick, supra, in holding that the search of the suitcase without a warrant violated the Fourth Amendment.

This line of cases, including Chadwick and Sanders, may fairly be read to require that when the focus of the investigation is not upon the automobile generally, i.e., the person occupying the automobile is a known drug dealer, the person in the automobile sold me drugs, etc., but is focused upon an identifiable thing or object or container placed in an automobile that the automobile exception, as it is understood, in Carroll, is not applicable.

The United States Court of Appeals for the Ninth Circuit in United States v. Salazar, 805 F.2d 1394 (9th Cir. 1986) read this line of

cases as holding such when it said:

> The Supreme Court has distinguished between searches of containers found in a car based upon probable cause that a specific container placed in a car contains contraband, and searches based upon a generalized belief that a car contains contraband somewhere inside. In the latter case, the entire vehicle, including closed containers found therein may be searched to the same extent as if a magistrate had issued a warrant based on the probable cause relied on by the officers. Ross 456 U.S. at 823. Where, prior to a search, officers have probable cause to believe that a specific closed container holds contraband, however, they must obtain a search warrant before opening it, even though it is located in an automobile.

The other line of cases, starting with Carroll, supra, which first recognized the automobile exception, generally hold that probable cause to search an automobile allows a search of a closed container in an automobile without the necessity of obtaining a warrant.

This Court in United States v. Ross, 456 U.S. 798 (1982) held:

> If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of a search.

In Ross, the police had received information from an informant that a described individual was selling

narcotics kept in the trunk of a particular car parked in a specified location. The police went to the specified area and stopped a vehicle and driver matching the description given by the informant. The officers opened the trunk without a warrant and obtained a paper bag from the trunk, and in opening that, discovered heroin. This Court held that the obtaining of a warrant was unnecessary and the evidence was not subject to suppression. It is important to note in Ross, supra, that the information provided to the police did not focus the investigation on an individual container or containers, but generally

upon the automobile. The police were given information that basically a drug dealer was selling drugs out of his car. Unlike Chadwick and Sanders, supra, where the focus of the investigation was on containers placed in a car.

In the case at bar, officers observed items being unloaded from an airplane into vehicles. The focus of the investigation was clearly upon the items placed in the vehicle. Officers did not have any information indicating that generally drugs would be found in the vehicles, but they were able to specifically identify those items which were placed in the

vehicles.

The holding in the case at bar cannot be squared with the Chadwick and Sanders line of cases and this Court ought to entertain this Petition for Writ of Certiorari in order to reconcile this conflict in the cases.

There is no principled distinction between a foot locker as in Chadwick or a suitcase as in Sanders or a pull-type bag as in the case at bar.

The above cases cannot be reconciled with Carroll and Ross, without doing violence to the warrant requirement.

POINT II

BECAUSE THE WARRANTLESS SEARCH OF THE AUTOMOBILES CONSTITUTED A VIOLATION OF PETITIONER KETANER'S FOURTH AMENDMENT RIGHT AND THE INFORMATION DERIVED FROM THAT ILLEGAL SEARCH WAS USED TO OBTAIN A WARRANT FOR THE SEARCH OF KETANER'S HOUSE. THE RESULTS OF THE SEARCH OF THE KETANER HOUSE ARE THE FRUITS OF THE POISONOUS TREE.

This Court in Wong Sung v. United States, 371 U.S. 471 (1963) and Dunaway v. New York, 442 U.S. 200 (1979) established the principle that if evidence is derived from a constitutional violation and there is no break in the causal connection between the constitutional violation and the evidence obtained, that the

evidence is the fruit of the "poisonous tree" and ought to be suppressed. This Court in Dunaway identified several factors to be considered in determining whether evidence is obtained by exploitation of an illegal detention or whether the causal connection has been broken. These factors are the temporal proximity of the constitutional violation and the search, the presence of intervening circumstances and the purpose and flagrance of the official misconduct.

In the case at bar, the Dunaway factors were not present. Therefore, the search of Petitioner Ketaner's

home and the evidence derived from that search is fruit of the poisonous tree under Wong Sung.

CONCLUSION

For the foregoing reasons, this Court ought to grant the Petition for Writ of Certiorari and review this important area of the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

STATE OF UTAH)
ss.
COUNTY OF SALT LAKE)

COMES NOW Kenneth R. Brown of Brown & Cox, and having been first duly sworn, depose and states as follows:

1. I am a member of the Bar of the Supreme Court of the United States.

2. That on the 23rd day of October, 1989, I deposited one original and 40 copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals, Ninth Circuit in the United States post office located at

Salt Lake City, Utah, addressed to the Clerk of the U.S. Supreme Court, Washington, D.C., 20543, first class postage prepaid. Such filing was timely.

3. That on the 23rd day of October, 1989, I deposited three copies of the foregoing Petition for Writ of Certiorari in the United States post office located at Salt Lake City, Utah, addressed to Stephen M. McNamee, United States Attorney, District of Arizona, and Robert A. Colosi, Assistant United States Attorney, 4000 United States Courthouse, 230 North First Avenue, Phoenix, Arizona, 85025, telephone

number (602) 261-3969, attorneys for Respondent.

4. That on the 23rd day of October, 1989, I deposited three copies of the foregoing Petition for Writ of Certiorari in the United States post office located at Salt Lake City, Utah, addressed to Solicitor General, Department of Justice, Washington, D.C., 20530.

KENNETH R. BROWN

SUBSCRIBED AND SWORN to before me this ____ day of October, 1989.

_____
NOTARY PUBLIC
Residing at Salt Lake City, Utah

My Commission Expires:

_____

APPENDIXES

APPENDIX "A"

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 1291
	)	
Plaintiff-Appellee,	)	DC No. CR-87-0317PGR
vs.	)	
	)	
GEORGE LEE MAYER,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	
UNITED STATES OF AMERICA,	)	No. 88-1292
	)	
Plaintiff-Appellee,	)	
	)	DC No. CR-87-0317PGR
vs.	)	
	)	
JOHN WILLIAM KETANER,	)	
	)	
Defendant-Appellant.	)	
	)	

UNITED STATES OF AMERICA,	)	No. 88
	)	1292
Plaintiff-Appellee,	)	
	)	DC No.
vs.	)	CR-87-
	)	0317PGR
URBAN DANIEL GOMES,	)	
	)	
Defendant-Appellant.	)	
	)	

MEMORANDUM

Appeal From the United States District Court for the District of Arizona Paul G.Rosenblatt, District Judge, Presiding

Argued and Submitted
March 13, 1989
San Francisco, California

Before: HUG, HALL, and O'SCANNLAIN, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Following the district court's denial of their motions to suppress, Mayer, Ketaner, and Gomes pleaded guilty to possession with intent to distribute marijuana. They now appeal their convictions, arguing, inter alia, that the government lacked sufficient probable cause to justify the warrantless searches of their automobiles. We review de novo a district court's finding of probable cause and its determination of the legality of warrantless searches, United States v. Linn, 862 F.2d 735, 739-40 (9th Cir. 1988), and we affirm.

The Fourth amendment to the Constitution requires the police to

obtain a warrant before searching one's property. U.S. Const. amend. IV. Among the various exceptions to this search-warrant requirement is the so-called "automobile exception," which holds that, so long as the police have probable cause to search a lawfully stopped vehicle, they may conduct the search of the vehicle and its contents without first obtaining a search warrant. United States v. Ross, 456 U.S. 798, 825 (1982); United States v. Vasquez, 858 F.2d 1387, 1391 (9th Cir. 1988). This exception does not apply, however, where an investigation focuses not on an automobile or its general contents,

but rather on a particular container which is subsequently placed in an automobile. United States v. Chadwick, 433 U.S. 1, 12-13 (1977); United States v. Salazar, 805 F.2d 1394, 1397-98 (9th Cir. 1986).

Here, the uncontroverted facts are that a reliable informant gave detailed information to investigators concerning a marijuana smuggling operation, information which was only fully corroborated when the plane piloted by the informant touched down where and when he said it would. Although the investigators were able to observe that the airplane's contents were being quickly

transferred to two waiting vehicles, their distance from the landing strip and the nature of the surrounding vegetation precluded them from identifying those contents, much less any particular containers, be they bags, bales, or bundles of marijuana. Under these facts, in which the police clearly had probable cause to stop the vehicles and arrest their drivers, but had neither observed nor focused their investigation on any "specific closed container believed to contain contraband," see United States v. Klein, 860 F.2d 1489, 1494 (9th Cir. 1988), we agree with the district court's conclusion that the

"automobile exception" line of authority governs this case.[1] See United States v. Johns, 469 U.S. 478, 482-83 (1985) (authorities' failure to observe and identify specific marijuana containers transferred from airplanes to waiting vehicles meant that probable cause to stop vehicles and arrest drivers permitted warrantless searches of automobiles;

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[1] Because of our holding that the district court did not err on the question whether the warrantless searches of the two vehicles were constitutionally permissible, Ketaner's argument concerning the "fruit of the poisonous tree" infecting the authorities' search of his residence with a warrant necessarily fails and merits no further discussion.

distinguishing both Ross and Chadwick).

AFFIRMED.

Filed May 22, 1989.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GEORGE LEE MAYER, Defendant-Appellant.	No. 1291 DC No. CR-87-0317PGR
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOHN WILLIAM KETANER, Defendant-Appellant.	No. 88-1292 DC No. CR-87-0317PGR ORDER

Filed July 17, 1989

Before: HUG, HALL, and O'SCANNLAIN, Circuit Court Judges

The panel has voted to deny the petition for rehearing and to reject

the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.